

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RAPTOR ARCHERY, INC., an)
Oregon corporation,)
Plaintiff,)
v.)
2 XJ ENTERPRISES, INC., a)
Maryland corporation,)
Defendant.)

No. CV-08-1328-HU

FINDINGS AND
RECOMMENDATION

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HUBEL, Magistrate Judge:

This is an action for trademark infringement brought by Raptor Archery, Inc. (Raptor) against 2XJ Enterprises, Inc. (2XJ), a Delaware corporation with its principal place of business in Maryland. Raptor is an Oregon corporation with its principal place

1 of business in Hood River. Declaration of Ted Fry ¶ 1. 2XJ moves to
2 dismiss the action for lack of personal jurisdiction.

3 **Factual Background**

4 Raptor sells traditional, as opposed to modern, archery
5 products, such as bows, arrows, broadheads, archery supplies and
6 raw materials. 2XJ is in the business of manufacturing and
7 wholesaling modern, technology driven broadheads used on hunting
8 arrows. A traditional broadhead for an arrow is rigid, while a
9 modern broadhead has moveable, deployable cutting blades below the
10 point. Both archery practices have strong adherents. According to
11 Ted Fry, the president of Raptor, his credibility and business
12 reputation among his traditional archery clientele is adversely
13 affected by identification with a modern broadhead. Fry Declaration
14 ¶ 6.

15 Raptor registered the "Raptor Archery" mark in March 1998. The
16 covered products are "archery equipment, namely bows, arrows,
17 quivers, shafts, feathers, broadheads, and points." Fry Declaration
18 ¶ 5. 2XJ concedes that between 2003 and the end of 2007, 2XJ sold
19 a mechanical broadhead under the name Crimson Raptor. Declaration
20 of Scott Mackie ¶ 5.

21 Raptor has submitted five invoices obtained in discovery
22 showing that 2XJ shipped a product identified as "Raptor" to
23 Oregon, and 31 other invoices showing Raptor products shipped to
24 Washington, California, Idaho, Utah and Nevada. Declaration of
25 William Sumerfield Exhibit B.

26 2XJ admits that some of the Crimson Raptor broadheads were
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1 sold in Oregon or shipped to outlets in Oregon. Supplemental
2 Declaration of Scott Mackie Correcting Declaration in Support of
3 Defendant's Motion to Dismiss ¶¶ 3, 4.

4 Attached to the Declaration of William Sumerfield as Exhibit
5 A are copies of printouts from 2XJ's website, located at
6 <http://www.spintite.com>. The printout lists 24 retailers in Oregon
7 and 14 national retailers doing business in Oregon, such as Dick's
8 Sporting Goods, Sportsman's Warehouse, and Wal-Mart, that carry 2XJ
9 products. Id.

10 Raptor has also proffered evidence that 2XJ advertises its
11 products nationally, including in Oregon. Attached to the Fry
12 Declaration as Exhibit A is the cover page and page 81 from the
13 August/September 2007 edition of *National Bowhunter* magazine. The
14 magazine was mailed to Fry at Raptor's place of business in Oregon.
15 The magazine contains a quarter page display for the Crimson Raptor
16 broadhead.

17 Fry states further in his declaration that on February 23,
18 2009, he received an email through his website from an individual
19 in Lafayette, Indiana inquiring about the Crimson Raptor broadhead.
20 Id. at Exhibit B.

21 Discussion

22 When a defendant's motion to dismiss is made as its initial
23 response and the court is asked to decide the motion without
24 conducting an evidentiary hearing, plaintiff need only make a *prima*
25 *facie* showing that personal jurisdiction exists, *i.e.*, facts that,
26 if true, would support the court's exercise of jurisdiction over
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1 the defendant. Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir.
2 2001); Mattel, Inc. v. Greiner and Hauser GMBH, 354 F.3d 857, 862
3 (9th Cir. 2003). Unless directly contravened, plaintiff's version
4 of the facts is taken as true; conflicts between the facts
5 contained in declarations submitted by the two sides are resolved
6 in plaintiff's favor. CE Distribution, LLC v. New Sensor Corp., 380
7 F.3d 1107, 1110 (9th Cir. 2004). The court need not decide whether
8 plaintiff has proven its contentions, but only whether it has made
9 a prima facie case for personal jurisdiction. Mattel, 354 F.3d at
10 862.

11 The parties agreed at oral argument that the issue in this
12 case is whether the court has specific jurisdiction over 2XJ.
13 Specific jurisdiction requires three things: 1) the non-resident
14 defendant must purposefully direct its activities or consummate
15 some transaction with the forum or a resident of the forum, or
16 perform some act by which it purposefully avails itself of the
17 privilege of conducting activities in the forum, thereby invoking
18 the benefits and protections of its laws; 2) the claim must be one
19 which arises out of or relates to the defendant's forum-related
20 activities; and 3) the exercise of jurisdiction must comport with
21 fair play and substantial justice, *i.e.*, it must be reasonable.
22 Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433
23 F.3d 1199, 1205 (9th Cir. 2006).

24 If plaintiff satisfies the first two prongs of this test,
25 defendant must present a "compelling case" that exercising personal
26 jurisdiction would not be reasonable. Schwarzenegger v. Fred Martin
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1 Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

2 Because a trademark infringement claim sounds in tort, the
3 purposeful direction test is appropriate. Id. For tort actions
4 courts may exercise jurisdiction over a defendant who engaged in an
5 act that had an effect in the forum state, even if the act itself
6 took place outside state boundaries. Roth v. Garcia Marquez, 942
7 F.2d 617, 621 (9th Cir. 1991). In Calder v. Jones, the Supreme Court
8 held that an act outside the forum that is both aimed at and has an
9 effect in the forum satisfies the first prong of the specific
10 jurisdiction analysis. 465 U.S. at 783. To satisfy the Calder test,
11 the defendant must have 1) committed an intentional act, which was
12 2) expressly aimed at the forum state, and 3) caused harm, the
13 brunt of which is suffered and which the defendant knows is likely
14 to be suffered in the forum state. Pebble Beach Co. v. Caddy, 453
15 F.3d 1151, 1156 (9th Cir. 2006).

16 The evidence showing that 2XJ has advertised the Crimson
17 Raptor product in a nationally circulated magazine received in
18 Oregon, and that it has shipped products bearing the accused mark
19 into Oregon is sufficient to make a *prima facie* showing of
20 purposeful direction.

21 The second requirement for specific jurisdiction is that
22 plaintiff's claim arise out of or relate to the defendant's forum-
23 related activities. This requirement is governed by the "but for"
24 test (whether plaintiff "would not have injured 'but for' the
25 defendant's ... conduct directed toward" the plaintiff). Tech Heads
26 Inc. v. Desktop Service Center, Inc., 105 F. Supp.2d 1142, 1151 (D.

1 Or. 2000). Claims based on the defendant's unauthorized use of
2 plaintiff's trademarks are claims related to the forum-related
3 contacts. Id. The "arising under" requirement is met in a tort
4 action if the cause of action would not have arisen "but for" the
5 alleged contacts between defendant and the forum state. Mattel, 354
6 F.3d at 864. Raptor has made a *prima facie* showing on the "arising
7 out of" requirement.

8 The question of reasonableness requires consideration of seven
9 factors: 1) the extent of a defendant's purposeful interjection; 2)
10 the burden on the defendant in defending in the forum; 3) the
11 extent of conflict with the sovereignty of the defendant's state;
12 4) the forum state's interest in adjudicating the dispute; 5) the
13 most efficient judicial resolution of the controversy; 6) the
14 importance of the forum to the plaintiff's interest in convenient
15 and effective relief; and 7) the existence of an alternative forum.
16 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985). No
17 single factor is dispositive; the court must balance all seven.
18 Core-Vent, 11 F.3d at 1488; Panavision Intern., L.P. v. Toeppen,
19 141 F.3d 1316, 1323 (9th Cir. 1998). 2XJ has not proffered evidence
20 that consideration of these factors would make the exercise of
21 personal jurisdiction in Oregon unreasonable.

22 I recommend that 2XJ's motion to dismiss (doc. # 11) be
23 denied.

24 **Scheduling Order**

25 The Findings and Recommendation will be referred to a district
26 judge. Objections, if any, are due August 10, 2009. If no
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1 objections are filed, then the Findings and Recommendation will go
2 under advisement on that date.

3 If objections are filed, then a response is due August 24,
4 2009. When the response is due or filed, whichever date is
5 earlier, the Findings and Recommendation will go under advisement.

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8 Dated this 24th day of July,
9 2009.

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11 /s/ Dennis J. Hubel

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13 Dennis James Hubel
14 United States District Judge
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